FILED
AUG 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

32

No. 06-43

IN THE

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,
Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. AND MOTOROLA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MERRILL LYNCH & CO., INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Merrill Lynch & Co., Inc. ("Merrill Lynch") is a diversified financial services company with over 60,000 employees worldwide. Merrill Lynch has previously filed amicus briefs in other cases before this Court that involved the federal securities laws or that affected the securities industry, including *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987). Merrill Lynch is filing this amicus brief principally to respond to the amicus brief of the Regents of the University of California ("the Regents"), which have separately filed a petition for certiorari that apparently is being held pending the disposition of this case. *See Regents of the Univ. of Cal.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 06-1341 ("*Enron*"), *petition for cert. filed* (Apr. 5, 2007). Merrill Lynch is one of the respondents in the *Enron* case.

This brief does not propose to address every issue or argument in this case. Respondents and other amici will do that. This brief focuses on two points. First, it responds to the Regents' improper suggestion that the Court's decision in this case should be guided by the potential consequences of that decision on the parties in *Enron*. Second, *Enron* illustrates a number of critical flaws in expanding the implied cause of action under §10(b) of the Securities Exchange Act

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondents have consented to the filing of this brief. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of amicus briefs, and a letter reflecting the consent of respondents to the filing of this brief has been filed with the Clerk.

of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), to include "scheme" liability.[2] These flaws include that "scheme" liability has no workable theory for what constitutes deception by commercial counterparties; does not satisfy other requirements for primary liability, such as reliance, loss causation, and the requirement in §10(b) that the deception be "in connection with" the purchase or sale of a security; is incompatible with the express causes of action in the securities statutes; and is unnecessary to deter wrongdoing by commercial counterparties. Regarding this last point, Merrill Lynch notes that it has paid a total of $109 million in cash to the U.S. Securities and Exchange Commission ("SEC") and to Enron's bankruptcy estate, nearly eight times more than it earned from its allegedly improper transactions with Enron.

STATEMENT OF THE CASE

Rather than present a traditional statement about the facts in this case, which will be thoroughly set forth by the respondents, Merrill Lynch provides a short summary of facts concerning the *Enron* case, in order to respond to misstatements and mischaracterizations in the Regents' brief. This is a prelude to our later demonstration that how the decision in this case may impact *Enron* is *not* relevant to the legal issues presented in this case. *See infra*, at 12-13. Indeed, it was improper for the Regents to suggest that the Court should consider the *Enron* case in deciding the legal issues before it in this case given that the Court does not decide cases that are not before it, nor does the Court interpret

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[2] As used throughout this brief, the phrase "'scheme' liability" refers to a theory of implied private civil liability under §10(b) invented by resourceful plaintiffs' class action counsel to ensnare defendants, such as commercial counterparties, that have made no misrepresentations to the market and had no duty to make disclosures to the issuer's investors. *See, e.g.*, Br. of Ohio, et al., as Amicus Curiae in Support of Petitioner at iii (defining Question Presented as: "Whether shareholders can recover damages from actors . . . even when the actor has made no false statement or omission and otherwise owes no fiduciary duty to the shareholders.").

statutes, such as the Exchange Act, or the elements of an implied cause of action, such as under §10(b), in an effort to favor parties in other cases.

The Regents' brief contains numerous factual misstatements or mischaracterizations about the *Enron* case that are contradicted by findings of federal judges and the Enron bankruptcy examiner, who reviewed the relevant factual records. The Regents' brief also omits critical facts about the Enron transactions that involved Merrill Lynch, ignores the significant payments that Merrill Lynch already has made in connection with those transactions, and grossly exaggerates the impact of Merrill Lynch's alleged conduct on investors and on the Regents' beneficiaries. Without addressing all of the Regents' factual misstatements and omissions, Merrill Lynch notes the following:

1. The Regents' rhetorical references to "the worst securities fraud in recent history," Regents' Br. at 5, should not obscure the fact that the Regents' claims against **Merrill Lynch** principally concern only three transactions that had a relatively insignificant impact on Enron's financial statements (*see infra*, at 21 n.6). Judicial decision makers in the *Enron* litigation have characterized these transactions much differently than have the Regents. The three transactions are: (1) Merrill Lynch's purchase of an interest in three barge-mounted power plants in Nigeria (the "barge" transaction); (2) Enron's purchase and sale of energy options from Merrill Lynch (the "energy option" transactions); and (3) the LJM2 limited partnership ("LJM2"), in which Merrill Lynch was one of 47 passive investors.

a. In 1999, Enron sold Merrill Lynch an interest in barges from which power was to be generated and sold to the Nigerian government. Enron, which initiated the transaction, booked approximately $12 million in income as a result of that sale to Merrill Lynch. Six months later, Merrill Lynch sold its interest in the Nigerian barges to LJM2. The Government claimed that Enron had booked profits on the

original sale to Merrill Lynch in order to inflate its reported revenues for 1999, but should not have done so because Enron had guaranteed that it would get Merrill Lynch out of the barge transaction within six months. The Government criminally charged certain former Merrill Lynch employees, who had participated in the barge transaction with Enron's Chief Financial Officer, Andrew Fastow, with aiding and abetting **Enron's** fraud.

Concurring in the Fifth Circuit's reversal of the criminal conviction of the former Merrill Lynch employees, Judge DeMoss disagreed with the Government's characterization of the barge transaction as a "sham" and concluded that any "wrong arising from [the transaction] . . . would be in Enron's employees' reporting of the transaction . . . *not in the manner in which Merrill's employees negotiated the deal.*" *United States* v. *Brown*, 459 F.3d 509, 536 (5th Cir. 2006) (DeMoss, J., concurring in part and dissenting in part) (emphasis added). In support of this conclusion, Judge DeMoss noted that:

> (1) Fastow himself averred to the Government that he, in fact, made only assurances of best efforts to Merrill, not promises or guarantees to take Merrill out of the deal; and (2) in conformance with the written agreement, Merrill actually paid $7 million to Enron, consistent with its purchase of an interest in the barge partnership investment, and therefore had absolutely no legally enforceable claim to be taken out of the deal.

Id. This analysis of the barge transaction by Judge DeMoss is completely at odds with the Regents' sweeping and unspecified allegations about "fake" transactions and "secret oral guarantees" by unspecified Enron "Banks." *See* Regents' Br. at 10-11.

b. At Enron's suggestion, Merrill Lynch entered into a series of call options that involved the purchase and sale of electricity. Large energy trading companies often engage in such transactions. *See* Dep. Tr. of Gary W. Dorris at 132:17 to 133:18 and 150:10-21. Enron booked a profit as a result of its energy option transactions with Merrill Lynch, with the approval of its auditors, Arthur Andersen. The only relevant dispute about the energy option transactions is whether Merrill Lynch faced risk with regard to those transactions.

The Regents' own expert conceded that "risk" was "borne by Merrill Lynch and Enron as a result of these energy trades." *See* Washer Decl. Ex. 2 (in support of SJ motion), Dep. Tr. of Joel Finard at 199:5-9. Merrill Lynch set aside reserves in connection with these transactions, a practice that indicates that Merrill Lynch believed at the time that the trades presented risk. *See* Washer Decl. Ex. 22, Dec. 1999 Reserves Explanations, MLNBY 0924434. In addition, another Regents' expert conceded that Merrill Lynch entered into hedges in connection with the energy transactions. Hakki Decl. Ex. D, Dep. Tr. of Saul Solomon at 760:4-7. Hedges typically were used because a transaction presented risk. *Id.* at 760:8-19.

c. LJM2 was an investment fund with 47 limited partner investors, including Merrill Lynch. Merrill Lynch also participated in a syndicate loan to LJM2 and acted as private placement agent for LJM2. Enron's bankruptcy examiner, Neal Batson, concluded that Merrill Lynch's involvement in LJM2 did not provide a basis for a claim against it of aiding and abetting Enron's officers in breaching their fiduciary duties, noting that he had

> discovered no evidence to date that would indicate Merrill Lynch had any role in the day-to-day operations of LJM2 or in the selection or approval of the transactions entered into by LJM2. Rather, Merrill Lynch's role appears to have been limited

> to that of a private placement agent and a passive limited partner/investor.

Washer Decl. Ex. 16, Appendix I to Third Interim Report of Neal Batson, Court-Appointed Examiner, *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y.) at 46 (June 30, 2003) ("Batson Report"). Similarly, there have been no enforcement or criminal proceedings concerning Merrill Lynch's role in LJM2.

2. To the extent that the Regents have asserted that Merrill Lynch and other Banks "designed," "devised," "structured" or "contrived" various Enron transactions (*see* Regents' Br. at 2, 4, 6, 10-11, 29), those allegations (at least insofar as they relate to Merrill Lynch) are contradicted by the findings of Enron's bankruptcy examiner.

The examiner specifically found that "the evidence indicates that **Enron** designed the Nigerian Barge transaction" and "that Merrill Lynch was not involved in structuring the Nigerian Barge transaction." Batson Report at 30-31 (emphasis added).[3] The examiner also found that "Enron designed the electricity trade transactions" and that "Merrill Lynch's only involvement in structuring the deal appears to have been its negotiation of the amount of its fee." Batson Report at 42. Finally, as previously noted, the examiner specifically found "no evidence to date that would indicate Merrill Lynch had any role in the day-to-day operations of LJM2 or in the selection or approval of the transactions entered into by LJM2." Batson Report at 46.

The Regents rely principally upon incomplete and misleading snippets of testimony from Mr. Fastow, who became the Government's star witness after pleading guilty to

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[3] Like the bankruptcy examiner, the district judge at the Enron barge criminal trial found that executives of Enron, rather than former employees of Merrill Lynch, were the "organizers, leaders, manager[s], and supervisors" of the barge transaction. Hakki Decl. Ex. A, Bayly Sentencing Tr. at 24:14-21.

felony charges. *See* Regents' Br. at 11-12. But even Mr. Fastow's testimony concerning transactions that specifically involved **Merrill Lynch** shows that Merrill Lynch did not design or devise those transactions:

a. With respect to the barge transaction, Mr. Fastow agreed that "it was someone at Enron, rather than Merrill Lynch, who came up with the idea of having Merrill Lynch purchase that barge interest." Dep. Tr. of Andrew Fastow at 1311. Mr. Fastow also could not dispute the fact that "Merrill Lynch played no role in preparing the actual accounting entries regarding the barge transaction that flowed into Enron's 1999 financial statements." Fastow Dep. Tr. at 1314.

b. Mr. Fastow's testimony is that *he* "created" the LJM2 partnership entity "with my limited partners and accountants and attorneys." Fastow Dep. Tr. at 1071. Mr. Fastow also testified that LJM2's structure was legal and it was only his subsequent misuse of the partnership in certain transactions that was improper. Fastow Dep. Tr. at 1076 ("my personal opinion is that the LJM entities were legal, but that some of the things I did with LJM were not legal").

Significantly, Mr. Fastow agreed that Merrill Lynch had no role in selecting LJM2's investments or in structuring the individual transactions in which the LJM2 partnership invested or participated. Fastow Dep. Tr. at 1357-58 (Merrill Lynch did not "bring[] any of these investment opportunities to LJM2," did not "recommend[] that LJM2 participate in these transactions," nor did it "actually structure any of the transactions"). It was Mr. Fastow's staff at LJM2, "primarily working with people at Enron," who "identified these opportunities and brought them to the LJM2 limited partners as prospective investments." Fastow Dep. Tr. at 1370.

3. The Regents assert that "Banks reaped huge profits" by participating in the alleged scheme that they will retain unless private civil class action plaintiffs can sue them under §10(b). *See* Regents' Br. at 5. This assertion certainly does

not apply to Merrill Lynch. Merrill Lynch earned a total of approximately $14 million from the allegedly improper Enron transactions (approximately $775,000 from the barge transaction, approximately $8.5 million from the energy option transactions, and approximately $5 million from LJM2). *See Brown*, 459 F.3d at 516 ("Merrill made $775,000 on its investment in the barges"); "SEC Charges Merrill Lynch, Four Merrill Lynch Executives with Aiding and Abetting Enron Accounting Fraud" (Mar. 17, 2003), *available at* http://www.sec.gov/news/press/2003-32.htm ("SEC Press Release") ("Merrill Lynch agreed to reduce its fee to $8.5 million to terminate the [energy option] transaction"); MLNBY 0050806 (Merrill Lynch's fees on the LJM2 transaction were "approximately $5 million").

In other proceedings, Merrill Lynch already has paid $109 million – nearly eight times more than the $14 million it earned – to resolve claims related to these transactions with Enron. In 2003, the SEC brought a complaint against Merrill Lynch and four former employees for *aiding and abetting* Enron's violations of the federal securities laws in connection with the barge and energy option transactions. *See* Complaint, *SEC* v. *Merrill Lynch & Co., Inc., et al.*, No. H-03-0946 (S.D. Tex. Mar. 2003), *available at* http://www.sec.gov/litigation/complaints/comp18038.htm (asserting claims against the Merrill Lynch defendants for aiding and abetting Enron's violations of §§10(b), 13(a), and 13(b) of the Exchange Act and related rules). Merrill Lynch, without admitting or denying the SEC's allegations, paid the SEC $80 million in disgorgement, penalties, and interest to settle that case. *See* SEC Press Release. These funds were to be distributed to investors in accordance with the Fair Fund provisions of the Sarbanes-Oxley Act of 2002. *Id.*

In agreeing to resolve the matter on these terms, the SEC expressly noted that it

> took into account certain affirmative conduct by Merrill Lynch. Merrill Lynch terminated [two

> employees] after they refused to testify before the staff and instead asserted their Fifth Amendment rights. In addition, Merrill Lynch brought the energy trade transaction to the staff's attention at a time when it believed the staff was unaware of its existence.

Id.

In addition, in the Enron bankruptcy proceeding, Merrill Lynch paid the Enron estate approximately $29.5 million to settle claims brought against it for its role in the barge, energy option, and LJM2 transactions.

Thus, when the Regents' inflamed rhetoric is stripped away and contrasted with the neutral assessments of the Enron bankruptcy examiner and federal judges, the facts that emerge are that: (1) Merrill Lynch played a minor role in a small number of the many transactions that Enron initiated, and (2) Merrill Lynch has been held fully accountable for that role through administrative and bankruptcy proceedings that have required Merrill Lynch to pay many times more than the amounts that Merrill Lynch earned on the barge, energy option and LJM2 transactions with Enron.

Despite these facts, the Regents are suing Merrill Lynch for approximately $40 *billion*, an amount that is nearly *3000* times as large as those earnings. This can hardly be characterized as "disgorgement" of Merrill Lynch's profits, but is merely an effort to extort huge sums of money from a deep-pocket defendant because the true malefactors went bankrupt, lost their assets to Government seizures, or had inadequate insurance. *See* Regents' Br. at 5 (discussing Enron's bankruptcy, the collapse of its accountants, limited insurance, and Government seizure of key insiders' assets).

4. The Regents make an emotional appeal that the Court should decide this case in a way that would advantage the "thousands of investors" who lost "billions of dollars" in the collapse of Enron. *See* Regents' Br. at 5. But the suggestion

that Enron investors suffered harm *caused by Merrill Lynch's conduct* has been rejected in other contexts. For example, at the criminal sentencing of the former Merrill Lynch employees who were convicted of aiding Enron's fraud arising from the barge transaction, the court, using a loss causation standard based on *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), concluded that "[n]o loss or intended loss can be proved to [be] reasonably estimate[d] in this case." Bayly Sentencing Tr. at 16-17 (noting "the Government's inability to prove economic loss or loss causation in a conventional manner"). The court found that only "$0.01 per share putative earnings" were derived by Enron from the barge transaction, which was dwarfed by Enron's 1999 earnings per share of approximately $1.10 and its $44 share price at the time of the transaction. *Id.* at 18.

5. Finally, the Regents' brief grossly exaggerates the extent to which their pension and endowment funds have suffered losses because of the collapse of Enron. *See* Regents' Br. at 1, 2, 6 n.8. Given that the Regents oversee a highly diversified institutional portfolio, the aggregate impact of Enron losses on their portfolio's value and performance was, by the Regents' own admission, relatively small. Charles McFadden, "UC joins federal class-action suit against Enron executives," at 2 (Jan. 7, 2002), *available at* http://www.ucsc.edu/currents/01-02/01-07/enron.html (quoting the Regents' treasurer as stating that, even with the Enron losses, the "University of California Retirement Plan[] equity portfolio recorded a return of 7.70 percent [for 2001], which was within 0.08 percent of its performance benchmark."). In particular, the Regents stated that their Enron losses "in no way affect[ed] the ability of the retirement plan . . . to meet its obligations to [its] beneficiaries." *Id.*

SUMMARY OF ARGUMENT

1. It is improper for the Regents to ask this Court to decide this case purposefully to dictate a victory for the Regents in *Enron*. This Court only decides the case before it and this Court has not granted certiorari in *Enron*. More generally, this Court decides legal issues of statutory interpretation and determines the elements of private civil liability based on neutral legal principles, not to assure favorable outcomes for certain parties.

2. *Enron* illustrates several legal flaws that require rejection of "scheme" liability:

(a) "Scheme" liability lacks a workable theory of what constitutes deception by commercial counterparties. The fact that the district court in *Enron* repeatedly flip-flopped on whether particular defendants and transactions fell within the reach of "scheme" liability demonstrates this point.

(b) The Court's decision in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), requires that the particular defendant's device or contrivance satisfy all elements of primary liability under §10(b). But in *Enron*, as in this case, plaintiffs have improperly sought to use "scheme" liability to avoid dealing with key elements of a claim under §10(b), including reliance and loss causation.

(c) No matter what label is chosen by plaintiffs' class action counsel, the core of "scheme" liability is assisting the issuer's misstatement. That is aiding and abetting.

(d) Contrary to *Central Bank*, "scheme" liability under §10(b) would improperly expand the defendant class for Rule 10b-5 actions "beyond the bounds delineated for comparable express causes of action," 511 U.S. at 180, in particular §18(a) of the Exchange Act. The Regents did not sue Merrill Lynch under §18(a) because it could not satisfy the elements of that express cause of action.

(e) Because other potent remedies are available, "scheme" liability is not needed to deter potential wrongdoing by commercial counterparties. This is illustrated by the fact that Merrill Lynch has paid $109 million to the SEC and Enron's bankruptcy trustee. In 1995, Congress decided to create an express action that allowed the SEC, but *not* private plaintiffs, to sue secondary actors. This dichotomy was "a deliberate congressional choice with which the courts should not interfere." *Central Bank*, 511 U.S. at 184.

ARGUMENT

I. THE COURT SHOULD IGNORE THE REGENTS' IMPROPER SUGGESTION THAT THIS COURT DECIDE THIS CASE IN A WAY THAT ASSURES THE REGENTS OF A VICTORY IN *ENRON*.

The Regents suggest that, in deciding whether there is an implied cause of action for "scheme" liability in this case, the Court should consider how that decision would impact the ability of the Regents to prevail in *Enron*. Regents' Br. at 5, 21. This suggestion is improper and is contrary to this Court's well-established practice.

The Court has not granted certiorari in the *Enron* case. Thus, in this case, the Court does not have before it either the voluminous *Enron* record (the appellate record alone exceeds 39,000 pages) or any arguments particular to *Enron*. After the Court announces the legal rule in this case, it can, if it chooses, address the petition being held in *Enron*.

As the Regents should be aware, this Court does not decide cases that are not before it and there is no reason to expect the Court to depart from that practice here. *See Citizens Against Rent Control/Coal. for Fair Hous.* v. *City of Berkeley, CA*, 454 U.S. 290, 299 n.6 (1981) (rejecting position that "argues a case not before the Court"). Moreover, this Court repeatedly adopts legal rules and renders legal decisions without regard to the media attention a particular case

receives. For example, despite the publicity associated with Enron's collapse, when this Court adjudicated a prior Enron-related case, it unanimously reversed a criminal conviction. *See Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005).

Contrary to the Regents' preference, in cases such as this, which require interpretation of "enormously complex and detailed statute[s] that resolve[] innumerable disputes between powerful competing interests," the Court does not merely resolve all questions "in favor of potential plaintiffs." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993). This Court has repeatedly adhered to neutral legal principles dictated by the rule of law, even when substantial financial crises have given rise to improper requests that the federal courts consciously establish pro-plaintiff rules. *See, e.g.*, *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 88 (1994) ("Our cases have previously rejected 'more money' arguments remarkably similar to the one made here.").

II. *ENRON* ILLUSTRATES FUNDAMENTAL FLAWS IN "SCHEME" LIABILITY THEORIES.

Enron illustrates the fact that the petitioner's "scheme" liability theory is unworkable and fatally flawed. This is significant because petitioner's *amici* repeatedly suggest that *Enron* is the paradigm for how "scheme" liability should work. If *Enron* is the paradigm, then the conclusion is inescapable that "scheme" liability theories are nothing more than dangerous vehicles for allowing clever and resourceful plaintiffs' class action lawyers artfully to recast aiding and abetting claims for exorbitant civil damages against commercial counterparties that played minor roles in transactions mischaracterized by others.

At the outset, it is important to note that Merrill Lynch is being sued for "scheme" liability in *Enron* because of its

commercial activities.[4] Any commercial company can buy or sell an asset (a barge) or a commodity hedge (an energy option). Thus, if Merrill Lynch's commercial activity is a basis for dragging it into a private §10(b) lawsuit about another company's securities, then any commercial counterparty, with hindsight, is potentially subject to a private §10(b) civil claim about another company's securities if it should later turn out that the company engaged in a fraud. This Court has rejected expansions of implied private civil liability under Rule 10b-5 that "could not be easily contained." *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 478 (1977).

Aware of these troubling implications of their "scheme" liability theory, the Regents seek to obscure the problem by suggesting that an implied private cause of action for "scheme" liability is necessary in *Enron* to hold Merrill Lynch and other Banks responsible for statements made by their employees when commenting on Enron's stock in analyst reports. *See* Regents' Br. at 6, 25 n.29, 30.

The Regents misleadingly fail to disclose that the *district court*, which favored "scheme" liability, nonetheless *dismissed* §10(b) claims that were premised on statements of research analysts – on the entirely independent ground that the Regents had not alleged that the specific employees associated with the analyst reports had acted with scienter. *See Enron* Pet. App. 230a-231a; *Southland Sec. Corp.* v. *INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366 (5th Cir. 2004)

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[4] Because §10(b) makes it "unlawful for *any person* . . . [t]o use or employ . . . any manipulative or deceptive device," 15 U.S.C. §78j(b) (emphasis added), §10(b) liability turns on the activities of the defendant, not whether the defendant is denominated "a lawyer, accountant, or bank," or anything else. *Central Bank*, 511 U.S. at 191. Thus, what matters for purposes of analyzing the Regents' "scheme" claims in *Enron* is that the Regents are suing Merrill Lynch for acting as a counterparty in a commercial transaction, not because Merrill Lynch provided investment banking or underwriting services.

("For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule 10(b) scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment."). After that ruling, the Regents also stopped pursuit of another §10(b) claim against Merrill Lynch based on its underwriting activities. The Regents did not cross-appeal the district court's scienter ruling to the Fifth Circuit, or even mention the dismissal of their analyst claims in the court of appeals.

The respondents in *Enron* pointed out all this in their opposition to the Regents' petition for certiorari. *See* Brief in Opposition, *Regents of the Univ. of Cal.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 06-1341, at 10-11 (June 1, 2007). The Regents did not respond to these points in their reply brief. They simply cannot dispute that the Fifth Circuit's rejection of "scheme" liability in *Enron* occurred in the context of Merrill Lynch's commercial activities. The Fifth Circuit's decision does not immunize any entity from private civil liability under §10(b) if, with scienter, it makes material misstatements to the market, including as an analyst or as an underwriter.

A. *Enron* Illustrates That "Scheme" Liability Lacks A Workable Theory Of What Constitutes "Deception" By Commercial Counterparties.

The Regents have conceded, in the questions presented in their certiorari petition and in their amicus brief in this case, that Merrill Lynch "itself ma[de] no affirmative misrepresentations to the market." *Enron* Pet. at i; Regents' Br. at i. Likewise, all the judges on the Fifth Circuit panel in *Enron* and the *Enron* district court agreed that Merrill Lynch owed no duty of disclosure to Enron shareholders given the absence of any fiduciary or special relationship between Merrill Lynch and those investors. *Enron* Pet. App. 15a,

123a.[5] *Enron* illustrates that even after six years of litigation, "scheme" liability lacks a workable theory of what constitutes deception by such a commercial counterparty. The Regents note in passing that the district court in *Enron* spent five years "refin[ing] its rulings regarding scheme liability to 'tighten' the standard." Regents' Br. at 6. This is an unavailing attempt to put a positive spin on the fact that the district court understandably was unable to apply the "scheme" liability theory in a consistent and predictable manner.

Central Bank held that liability under §10(b) is "'an area that demands certainty and predictability.'" 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). This is because uncertainty drives up the costs of numerous legitimate transactions and eliminates some altogether. *See* 511 U.S. at 188-89. Yet the record in the *Enron* case graphically illustrates that "scheme" liability inevitably creates "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services." *Central Bank*, 511 U.S. at 188 (quoting *Pinter*, 486 U.S. at 652). For example, the claims against Barclays in the *Enron* case initially were upheld, then were dismissed, and then the district court granted the Regents leave to replead those

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[5] Commercial counterparties do not have a duty of disclosure with respect to an issuer's investors because "such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980) (referencing "the established doctrine that duty arises from a specific relationship between two parties"). As both the Fifth Circuit and the *Enron* district court agreed, Merrill Lynch and Enron's investors were not "parties to a transaction," and certainly were not in a relationship of trust and confidence. *Regents of the Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 384 (5th Cir. 2007); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. H-01-3624, 2006 U.S. Dist. LEXIS 43146, at *101-02 (S.D. Tex. June 5, 2006). The *Enron* case is *a fortiori* one without a duty because Merrill Lynch never engaged in a securities transaction with Enron's investors and the investors were not aware of the Merrill Lynch transactions with Enron.

claims (expressly subject to potential dismissal at the summary judgment stage). The district court explicitly attributed each change of decision to the difficulty of assessing "scheme" liability of secondary actors. *Enron* Pet. App. 678a; *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 439 F. Supp. 2d 692, 713-16, 724 (S.D. Tex. 2006); *Enron* Pet. App. 315a-320a. Indeed, the Regents conceded the inherent uncertainty and shifting contours of "scheme" liability in arguing that the district court should revive their claims against Barclays:

> In its current motion, Lead Plaintiff seeks "a fair opportunity to plead this case *in accordance with the coalescing standard of scheme liability* that is to be ultimately applied in this matter" so as to "*avoid being caught unawares* by refined rules being articulated in the middle of briefing dispositive motions and then applied to pleadings that were crafted ***years before those rules were refined*** . . . ."

Enron Pet. App. 315a (italics added, bold in original).

The district court in *Enron* also first dismissed, then reinstated and then dismissed again the Regents' claims against Deutsche Bank, another counterparty that allegedly participated in the same "scheme." *Enron* Pet. App. 578a-581a, 670a; *Enron* Pet. App. 333a, 344a-364a; *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, No. MDL-1446, 2005 WL 1798423, at *1-*3 (S.D. Tex. July 26, 2005); *Enron* Pet. App. 284a-294a. The Deutsche Bank example is particularly noteworthy because the district court dismissed claims against Deutsche Bank relating to its involvement in LJM2 on the ground that the allegations against Deutsche Bank amounted to no more than aiding and abetting, even though, *unlike* Merrill Lynch, Deutsche Bank (1) served on LJM2's advisory board with respect to LJM2's ongoing operations; and (2) structured transactions involving LJM2. *Enron* Pet. App. 291a. *Compare supra*, at 7. The

inconsistency between the district court's dismissal of the claims against Deutsche Bank relating to LJM2 and the Regents' claims against Merrill Lynch for its more remote association with LJM2 further demonstrates why the vague and overbroad theory of "scheme" liability could never provide the "certainty and predictability" required by *Central Bank*.

B. *Enron* Illustrates That, Contrary To *Central Bank*, "Scheme" Liability Does Not Satisfy The Other Requirements For Primary Liability, Including Reliance and Loss Causation.

Under *Central Bank*, the line between primary liability and aiding and abetting requires that *the defendant's own* "device or contrivance" satisfy *all* of the requirements for primary liability. *Central Bank* states:

> Any person or entity, including a lawyer, accountant, or bank, *who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies* may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

511 U.S. at 191 (first emphasis added; second emphasis in original). Accordingly, in order for a defendant to be liable as a primary violator in a private §10(b) case, that defendant must employ a deceptive device or contrivance that is itself relied on by the plaintiff and that satisfies the other requirements for §10(b) primary liability, including loss causation. A plaintiff cannot mix and match the elements of primary liability by relying upon the conduct of one defendant for some elements and the conduct of another defendant for other elements.

Thus, for example, a plaintiff cannot rely upon a device or contrivance allegedly used by *defendant A* (*e.g.*, an allegedly misleading confirmation to auditors) to satisfy the deception element of §10(b), with a different device or contrivance (*e.g.*, an allegedly misleading financial statement) used by *defendant B* to satisfy the reliance or loss causation elements of primary liability against *defendant A*. The *Enron* case demonstrates that commercial counterparties do not satisfy all of the requirements for primary liability under §10(b) in a private civil case.

1. Reliance: As *Central Bank* held, when a private plaintiff seeking "recovery under Rule 10b-5" cannot establish that he or she relied upon the alleged misstatements or omissions of a particular defendant, the claim against that defendant is no more than a claim seeking to impose aiding and abetting liability:

> [R]espondents' argument would impose 10b-5 aiding and abetting liability when at least one element critical for recovery under 10b-5 is absent: reliance. A plaintiff must show reliance on *the defendant's* misstatement or omission to recover under 10b-5. Were we to allow the aiding and abetting action proposed in this case, *the defendant* could be liable without any showing that the plaintiff relied upon *the aider and abettor's* statements or actions. *See also Chiarella* [v. *United States*], 445 U.S. [222, 228 (1980)] (omission actionable only where duty to disclose arises from specific relationship between two parties). Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

511 U.S. at 180 (emphases added; citation omitted).

Even if a commercial counterparty were to participate in a "sham" transaction that enabled an issuer to make a misstatement to investors, a plaintiff could only establish that he or she relied on the issuer's misstatement and not on the

actions of the commercial counterparty. For example, in *Enron*, the Regents' claim against Merrill Lynch is premised on the plaintiffs' reliance on the financial statements of the issuer, Enron. *See Enron* Pet. at 25 (asserting reliance because the market "was impacted by the company's falsified financial statements"). This is an aiding and abetting claim barred by *Central Bank*'s requirement that the plaintiffs demonstrate "reliance on *the defendant's* misstatement or omission." 511 U.S. at 180 (emphasis added); *see Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 173-76 (2d Cir. 1998) (because investors relied on the issuer's statements, not on the defendant's false but undisclosed statement, defendant's statement constituted aiding and abetting, not primary liability); *Filler* v. *Hanvit Bank*, 156 F. App'x 413, 415 (2d Cir. 2005) (same ruling applied to bank's undisclosed "sham" transaction and to "false loan confirmations" sent to the issuer's auditor).

2. Loss Causation: The Private Securities Litigation Reform Act of 1995 ("PSLRA") requires that "the *act or omission of the defendant* alleged to violate this title caused the loss" for which the plaintiffs seek damages. 15 U.S.C. §78u-4(b)(4) (emphasis added). Once again, *Enron* illustrates that "scheme" liability for a commercial counterparty does not satisfy "*all* of the requirements for primary liability." *Central Bank*, 511 U.S. at 191 (emphasis in original).

As *Dura Pharmaceuticals* holds, loss causation requires that the issuer's stock price declined because of the revelation of the defendant's deceptive act or omission. 544 U.S. at 344; *see also Ray* v. *Citigroup Global Mkts., Inc.*, 482 F.3d 991, 995 (7th Cir. 2007) ("plaintiffs must show both that the *defendants'* alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception") (emphasis added); *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007) (plaintiffs failed to allege loss causation because they "have not alleged facts to show that *Deloitte's*

misstatements, among others (made by Warnaco) that were much more consequential and numerous, were the proximate cause of plaintiffs' loss") (emphasis added).

As the district court in the Enron barge criminal case ruled, no loss caused by Merrill Lynch's conduct could be proved under the *Dura* standard. *See supra*, at 10. In the *Enron* civil case, the plaintiffs' experts testified that they did not isolate any stock price decline caused by revelation of Merrill Lynch's transactions, as opposed to revelation of far broader misstatements and omissions by Enron. *E.g.*, Appellants' Record Excerpt No. 11 before the Fifth Circuit at 30973-74 ("5th Cir. R.E."), Dep. Tr. of Scott D. Hakala at 63, 254; 5th Cir. R.E. No. 10 at 30978, 30986, Dep. Tr. of Blaine F. Nye at 540-43, 584-86.[6] Enron's statements and omissions, however, were not "the act or omission *of the defendant*" from which the Regents seek to recover, *i.e.*, Merrill Lynch, which the PSLRA requires the Regents to show in order to establish loss causation as to Merrill Lynch.

It is not surprising, therefore, that the Regents are pursuing a "scheme" liability claim against Merrill Lynch that, they argue, permits loss causation based upon the "conduct of *other* scheme participants about which [Merrill Lynch] knew nothing." *Enron* Pet. App. 194a (emphasis added). That approach, however, flies in the face of the PSLRA's loss causation requirement and with *Central Bank*. It suggests that the courts should create an implied cause of action for conspiracy to violate §10(b), which is directly contrary to the

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[6] The Regents' accounting expert conceded that the challenged Enron transactions that involved Merrill Lynch had only a negligible impact on Enron's financial results. Specifically, he concluded that the barge and energy option transactions accounted for only $7 *million* of Enron's $12.87 *billion* in misstated debt (approximately five one-hundredths of a percent), $62 *million* of the $3.28 *billion* in misstated income (approximately 1.89%), and none of the misstated cash flow (0%). 5th Cir. R.E. No. 6 at 31036-37, 31040-43, excerpts from the February 22, 2006 Supplement to the Expert Report of Saul Solomon.

uniformly accepted view that under *Central Bank* there can be no such cause of action. *See, e.g., Dinsmore* v. *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 842 (2d Cir. 1998) (concluding that *Central Bank* precludes conspiracy liability under §10(b)); *Glaser* v. *Enzo Biochem, Inc.*, 126 F. App'x 593, 599 (4th Cir. 2005), *cert. denied*, 127 S. Ct. 1876 (2007) (same); *In re GlenFed, Inc. Sec. Litig.*, 60 F.3d 591, 592 (9th Cir. 1995) (same).

3. "In Connection With": Section 10(b) applies to a particular defendant only if *that defendant* used or employed a deceptive device or contrivance "in connection with" the purchase or sale of a security.[7] In *United States* v. *O'Hagan*, this Court held that §10(b)'s "in connection with" requirement is satisfied only when the consummation of the particular defendant's fraud and "[t]he securities transaction . . . coincide." 521 U.S. 642, 656 (1997).

Assuming, for the sake of argument, that a commercial counterparty's participation in an undisclosed transaction can constitute a "deceptive device or contrivance," that counterparty's conduct stops at that transaction and thus does not "coincide" with any securities transaction. There are at least three intervening steps between the counterparty's conduct and any securities transaction. The first is that the issuer has to prepare false financial statements. The second is that the auditor has to certify those financial statements. The third is that the false financial statements have to be circulated to the public. The "in connection with" requirement would not be satisfied if a commercial counterparty engaged in a "sham" transaction but the issuer ultimately accounted for that transaction properly or never circulated financial statements that were affected by that transaction. *See O'Hagan*, 521 U.S. at 656 (the "fraud is consummated . . .

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[7] *See* §10(b) ("It shall be unlawful for *any person* . . . [*t*]*o use or employ*, in connection with the purchase or sale of any security . . . , *any manipulative or deceptive device* or contrivance . . . .") (emphasis added).

when . . . the information [is used] to purchase or sell securities").

This example demonstrates that the counterparty's liability under the Regents' "scheme" theory depends on and derives from the statements and actions of the issuer. That, in a nutshell, reduces the Regents' claim to nothing more than a claim of aiding and abetting.

C. *Enron* Illustrates That The Gravamen Of A "Scheme" Liability Claim Is Nothing More Than "Aiding and Abetting" With A Different Label.

As previously discussed, the Regents' assertion that Merrill Lynch and other Banks "designed," "devised," "structured" or "contrived" the **Enron** transactions (Regents' Br. at 2, 4, 6, 10-11, 29) is demonstrably false insofar as those allegations are made against Merrill Lynch. *See supra*, at 6-7.

Moreover, the Regents' rhetorical flourishes illustrate the lengths to which resourceful plaintiffs' lawyers will go to avoid the words aid, abet, or assist. Regents' choice of verbs is part of an effort to rewrite §10(b) to reach aiding and abetting. None of the verbs proposed by the Regents is in §10(b). The statute makes it unlawful to "*use or employ* . . . any manipulative or deceptive device or contrivance," *not* to "design or devise" a deceptive device or contrivance. 15 U.S.C. §78j(b)(emphasis added). The Regents cannot change the scope or meaning of the statutory prohibition by changing the nouns "device" and "contrivance" into verbs, or by choosing other verbs that suit their goals better than "use or employ." *See Central Bank*, 511 U.S. at 175 ("the statutory text controls the definition of conduct covered by §10(b)").

Nor is "designed" or "devised" a synonym for "used" or "employed." For example, Hillerich & Bradsby designs the Louisville Slugger baseball bats used by 60% of major league players. But it is the players, not the manufacturer, who use or employ the bats.

Most important, the gravamen of any claim that a commercial counterparty improperly "designed" a commercial transaction is that the counterparty "aided" or "assisted" the issuer in its efforts to issue false financial statements. Thus, whether a counterparty "designed" or merely "participated in" an improper transaction, a plaintiff could not establish key elements of a §10(b) claim against that counterparty, such as reliance or loss causation, by pointing to the counterparty's conduct (as opposed to the issuer's alleged misstatements).

Regardless of which label is used to describe a counterparty's responsibility for an allegedly deceptive transaction (*i.e.*, that the counterparty "designed" or "contrived" that transaction), the plaintiffs' §10(b) claim would fail because the counterparty (1) made no misstatements to the market and had no duty to make disclosures to the issuer's investors; (2) the plaintiffs' loss causation theory would be improperly based on the acts or omissions of the issuer and not on the acts or omissions of the counterparty; and (3) the counterparty's conduct would not have coincided with a securities transaction. As a result, commercial counterparties should not be subject to primary private civil liability under §10(b) regardless of the verb choice of plaintiffs' class action counsel.

D. *Enron* Illustrates That Private "Scheme" Liability Claims, Such As Those Made In This Case, Are Incompatible With The Express Private Causes Of Action In The Securities Statutes.

In *Central Bank*, this Court held that the line between aiding and abetting and primary liability must be carefully defined to ensure that §10(b) private civil liability does not "expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action." 511 U.S. at 180. Section 18(a) of the Exchange Act expressly imposes liability on a defendant that "cause[d] to be made" a

misstatement by another party, but expressly requires not only that the plaintiff "purchased or sold a security at a price which was affected by such statement" but *additionally* that the plaintiff made that purchase or sale "in reliance upon such statement" and that plaintiff's loss was caused by the defendant's actions. 15 U.S.C. §78r(a).

Petitioner concedes that a "scheme" liability claim is one against "persons who caused misrepresentations to be made." Pet. Br. at 30. Regents and petitioner, however, did not and could not sue under §18(a) because their "fraud on the market" allegations do not satisfy §18(a)'s requirement that the plaintiffs individually relied upon the defendants' alleged misstatements.[8] *E.g.*, *Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03-CV-5750/5751, 2005 U.S. Dist. LEXIS 43300, at *31 (S.D.N.Y. 2006); *In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785, 798 (S.D. Cal. 1990).

Thus, *Enron* illustrates that a claim that a commercial counterparty, such as Merrill Lynch or the respondents in this case, "caused" the misstatements of an issuer would often fall "beyond the bounds" of §18(a) liability. *Central Bank*, 511 U.S. at 180. Accordingly, the same claim should fail under §10(b). Otherwise, "the defendant class for 10b-5 actions"

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[8] None of the express causes of action available under the federal securities laws, including claims under §§11 and 12 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§77k, 77*l*, and §§9, 16(b), 18 and 20A of the Exchange Act, 15 U.S.C. §§78i, 78p(b), 78r, 78t-1, allows recovery on the basis of "scheme" liability. Nor do the "control person" provisions in §15 of the Securities Act, 15 U.S.C. §77o, and in §20 of the Exchange Act, 17 U.S.C. §78t. Taken together, the absence of "scheme" liability in these express causes of action suggests that Congress did not intend for there to be any form of derivative or secondary liability under §10(b) for persons who did not themselves use or employ a deceptive or manipulative device or contrivance, except for persons who "control" those who did.

would expand "beyond the bounds delineated for comparable express causes of action." 511 U.S. at 180.

E. *Enron* Illustrates The Reality That Commercial Counterparties Are Subject To Numerous Deterrents And Remedies That Make Unnecessary A New Private Cause of Action Under §10(b).

The sum of $109 million paid by Merrill Lynch illustrates that the absence of §10(b) private civil liability for commercial counterparties does not mean that they "get away with" participating in deceptive transactions. They are subject to a variety of express SEC claims, including under §20(e) of the Exchange Act for aiding and abetting. *See also* §17(a) of the Securities Act, 15 U.S.C. §77q (authorizing SEC action against "scheme" participants). They and their employees are subject to federal and state criminal investigation and prosecution. They may be subject to state common law claims for aiding and abetting, where such claims are recognized, and they are subject to enforcement proceedings by state attorneys general.

In any event, this Court has rejected arguments that it should expand the scope of the §10(b) implied cause of action based on policy arguments about deterrence. *See, e.g.*, *Central Bank*, 511 U.S. at 188-90; *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 717 (1974) ("If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of a legal duty to the particular plaintiff would have to be alleged.").

Similarly, this Court has repeatedly expressed "concern that the inexorable broadening of the class of plaintiffs who may sue in this area of the law will ultimately result in more harm than good." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 747-48 (1975); *accord Ernst & Ernst* v. *Hochfelder*,

425 U.S. 185, 214 n.33 (1976). In *Blue Chip Stamps*, the Court recognized and approved the admonition of Chief Judge Cardozo in *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), that courts should hesitate to allow claims that create "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." 421 U.S. at 747-48.

Most importantly, after *Central Bank*, Congress refused to expand the private right of action to deter misconduct by secondary actors. Both the SEC and the private plaintiffs' bar asked Congress to overrule *Central Bank* and extend private civil liability under §10(b) to secondary actors. In enacting the PSLRA in 1995, Congress chose to provide the SEC, but *not* private plaintiffs, with the ability to pursue secondary actors, as the SEC did in *Enron*.

In the PSLRA, Congress specifically granted the SEC authority to bring actions in federal district court for aiding and abetting violations of §10(b) by providing that, in actions brought by the SEC, "any person that *knowingly provides substantial assistance* to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision *to the same extent as the person to whom such assistance is provided*." 15 U.S.C. § 78t(e) (emphases added).

Since 2002, the SEC has used its aiding and abetting and other enforcement authority to recover approximately $8 billion for distribution to investors. SEC, *2006 Performance and Accountability Report* 23 (Nov. 2006), *available at* http://www.sec.gov/about/secpar2006.shtml.

Congress concluded that allowing §10(b) claims by private plaintiffs against secondary actors would undermine the PSLRA's goal of reducing meritless lawsuits. *See* H.R. CONF. REP. NO. 104-369 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730. The Senate Report summarized the resolution that was codified:

> The Committee considered testimony endorsing the result in Central Bank and testimony seeking to overturn this decision. The Committee believes that *amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation.* The Committee does, however, grant the SEC express authority to bring actions seeking injunctive relief or money damages against persons who knowingly aid and abet primary violators of the securities laws.

S. REP. NO. 104-98, at 19 (1995) (emphasis added), *as reprinted in* 1995 U.S.C.C.A.N. 679, 698.[9]

This Court has emphasized that any decision to expand §10(b) private civil liability must be left to Congress. *Central Bank*, 511 U.S. at 176-78, 188-90; *Santa Fe Indus.*, 430 U.S. at 479-80. "The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Central Bank*, 511 U.S. at 184.

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[9] After Enron collapsed, Congress, in the Sarbanes-Oxley Act of 2002, modified the Exchange Act in several respects, but Congress again declined to extend private civil liability to aiders and abettors, notwithstanding arguments to do so. *See* H.R. REP. NO. 107-414, at 54 (2002); 148 CONG. REC. S6584 (daily ed. July 10, 2002).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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August 15, 2007

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